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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Cumberland Sound, Inc.

File: B-248014.2

Date: August 21, 1992

W. H. Kavanaugh for the protester,
Eric A. Lile, Esq., and Robert C. Peterson, Esq., Department
of the Navy, for the agency.
M. Penny Ahearn, Esq., and David Ashen, Esq., Office of the
General Counsel, GAO, participated in the preparation of the
decision.

DIGEST

Protest raising same argument denied in A-76 appeal decision is untimely where filed with the General Accounting Office (GAO) more than 10 working days after protester received the appeals board's denial; once informed of initial adverse agency action, protester may not delay filing subsequent protest with the GAO while it continues to pursue the matter with the agency.

DECISION

Cumberland Sound, Inc. protests the Department of the Navy's determination to retain for in-house performance piloting services at the Naval Submarine Base, Kings Bay, Georgia, instead of contracting for the services under request for proposals (RFP) No. N00612-91-R-K061. The Navy based its determination on an Office of Management and Budget (OMB) Circular A-76 comparison which showed that the estimated cost for the agency's in-house performance would be lower than Cumberland's offered price for the services.

We dismiss the protest as untimely filed.

On December 23, 1991, Cumberland was notified by the Navy that the agency's cost comparison indicated that in-house performance would be less costly than contracting with Cumberland, the low offeror under the RFP. Cumberland timely filed an administrative appeal of the agency's determination on January 13, 1992, contending that the government did not include certain cost elements in its cost comparison calculation, which would have made the government's estimate higher than Cumberland's offer. Of

several alleged mistakes in the comparison, Cumberland argued that the in-house estimate was based on insufficient staffing because it provided for only three pilots, while the RFP indicated that four pilots should be available in certain situations, and Cumberland's proposal included the cost of having pilots available when these situations arise. The board denied the appeal on the staffing level, finding that the current staffing of four pilots could be reduced to three by reassigning collateral duties to a nonpilot position, as the Navy had done. Although the appeals board found some other errors in the comparison calculations, they were not sufficient to establish that Cumberland's price was lower than the cost of in-house performance. The board thus upheld the decision to retain the work in-house.

After receiving the appeal denial on February 15, Cumberland filed a protest with the contracting officer by letter dated February 24. Cumberland again challenged the failure to include the cost of a fourth pilot in the government estimate; this time it argued more specifically that it was improper for the Navy to provide for the collateral duties cited by the board to be performed by a lower salaried nonpilot, while Cumberland was required by the solicitation to provide for a fourth pilot. The agency denied this protest by letter dated March 5.

On March 19, Cumberland filed a protest with our Office, reasserting its argument that the government's in-house estimate improperly provided for only three pilots when the solicitation required that four be available. Subsequently, on April 11, pursuant to a previously filed Freedom of Information Act request, the protester received a copy of the agency's most efficient organization (MEO) study. Thereafter, on April 21, Cumberland filed what it characterized as a "supplemental bid/award protest" with our Office, essentially repeating its February 24 agency level protest that the in-house estimate improperly provided for pilot services to be performed under a non-pilot position.

Where, as here, a protest is first filed with the contracting agency, any subsequent protest to our Office must be filed within 10 working days of actual or constructive knowledge of initial adverse agency action on the protest. 4 C.F.R. § 21.2(a)(3) (1992). Once informed of initial adverse agency action, such as denial of an A-76 appeal, a protester may not delay filing a subsequent protest while it continues to pursue the protest with the agency. Space Age Eng'g, Inc., B-230148, Feb. 19, 1988, 88-1 CPD ¶ 173.

The appeals board decision received by Cumberland on February 15 constituted initial adverse agency action on the pilot staffing level issue (as well as the other issues

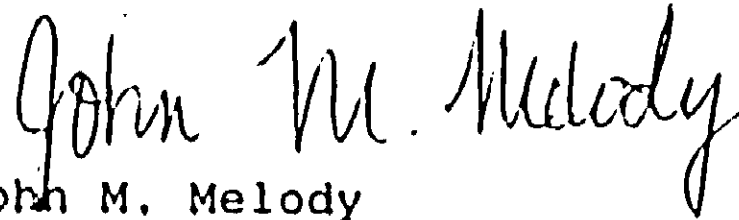
raised in the appeal). Cumberland therefore was required to file any protest on this issue with our Office within 10 working days. Instead of doing so, however, Cumberland chose to pursue the matter further with the agency by means of its February 24 protest letter to the contracting officer. Cumberland did not then protest to our Office until March 19, more than 10 working days after its receipt on February 15 of the appeals board decision. The protest to our Office therefore is untimely. Id.

Our conclusion reflects in part our view that Cumberland's February 24 agency-level protest did not raise a new argument but, rather, was essentially only an elaboration on one of Cumberland's A-76 appeal arguments. Although the agency-level protest addressed for the first time the allocation of collateral duties to a nonpilot, the legal essence of the protest argument remained the same as the one that the appeals board denied: the solicitation required four pilots, and the Navy's costing of only three pilots--for whatever reason--therefore was improper. This being the case, by protesting this issue to the contracting officer, Cumberland was merely continuing to pursue the matter with the agency even after the initial adverse agency action in the form of the board's denial of the appeal. While a protester certainly may chose this option, as indicated above, doing so does not toll the running of the time period for filing a protest with our Office. Space Age Eng'g, Inc., supra. Again, to the extent that Cumberland wished to challenge the conclusions reached by the appeals board in a protest to our Office, it was required to do so by March 2, notwithstanding any further argument it wished to pursue with the Navy.

The fact that Cumberland raised the collateral duties argument in its separate February 24 agency-level protest, and then, subsequently, in a separate April 21 protest to our Office (after receiving a copy of the agency's most efficient organization (MEO) study), suggests that Cumberland believes this issue is different from its appeal argument. Even if we viewed the February 24 agency-level protest as raising a new issue (i.e., the collateral duties issue), Cumberland's March 19 protest to our Office nevertheless would be untimely, since it was based only on the alleged solicitation requirement for a fourth pilot, with no mention of the collateral duties issue. Again, any protest based on the denied appeal arguments had to be raised no later than March 2. Similarly, Cumberland's separate, supplemental protest to our Office on April 21 would be untimely under this alternate view, since it repeated the collateral duties argument raised in the agency-level protest, which was denied by the contracting officer on March 5, more than 6 weeks before the protest was filed in our Office. In this latter regard, although

Cumberland maintains that the April 21 protest was based on the copy of the MEO it received on April 11, the fact that the firm was able to protest on this ground to the agency in February clearly shows Cumberland had sufficient information to make this argument well before it saw the MEO.

The protest is dismissed.

A handwritten signature in cursive script that reads "John M. Melody". The signature is written in dark ink and is positioned above the printed name and title.

John M. Melody
Assistant General Counsel